Supreme Court, U.S.
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No. 87-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, EDWARD C. SCHMULTS,
and CAROL E. DINKINS,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM OF APPELLEES SCHMULTS AND DINKINS

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MEMORANDUM OF APPELLEES SCHMULTS AND DINKINS

Edward C. Schmults and Carol E. Dinkins, appellees in the above-entitled case, file this memorandum in response to the Jurisdictional Statement filed by Independent Counsel Alexia Morrison seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in *In re Sealed Cases*, Nos. 87-5261, 5264 and 5265 (Jan. 22, 1988). That decision held that the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, are unconstitutional.

This case presents the question of the constitutionality of the independent counsel provisions of the Ethics in Government Act. That Act authorizes a special three-judge court to appoint an independent counsel who exercises all the prosecutorial authority and discretion of the Attorney General of the United States with respect to a certain range of activity. The Act additionally authorizes the special court to define that independent counsel's prosecutorial jurisdiction and to review *de novo* and overrule any effort by the Attorney General to remove an independent counsel. Appointment of an independent counsel by the special court therefore divests the Attorney General of any power to participate in, guide, or control any aspect of the matter within the independent counsel's jurisdiction.

While appellees believe the court of appeals' ruling was absolutely correct and should be affirmed by this Court, appellees do not move for dismissal or summary affirmance. As appellant notes in her Jurisdictional Statement (at 2), appellate jurisdiction is proper under 28 U.S.C. § 1252, since the court of appeals struck down federal legislation as unconstitutional in the context of a civil contempt proceeding. Moreover, although appellees believe that the constitutional defects in the Act are clear for the reasons stated by the court of appeals, appellees agree that full briefing and argument is appropriate in a case of this significance. *See* Sup. Ct. R. 16.1(c).

Appellees note, however, that the "ripeness" issue presented on this appeal is not properly before this Court. As the court of appeals ruled, appellees' challenge to the authority of the independent counsel is "ripe" and, in any event, as the court of appeals also ruled, appellant waived her "ripeness" argument by her failure to raise it in the district court. (J.S. App. 9 n.6). Her effort to raise that issue anew in this Court, and to force full briefing

on that issue if probable jurisdiction is noted, is wholly unwarranted.

Respectfully submitted,

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Dated: February 12, 1988